JLN/GEW/tcg 2/3/99

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers (IntraLATA Presubscription Phase)	I.87-11-033 (Petition to Modify Filed September 8, 1998)

ASSIGNED COMMISSIONER'S RULING

On January 25, 1999, the United States Supreme Court held that the Federal Communications Commission (FCC) has general jurisdiction to implement the local competition rules of the Telecommunications Act of 1996. (AT&T Corp. v. Iowa Utils. Bd. (1999) ___ U.S. ___, 1999 WL 24568, *6-*7.) In this regard, the Court specifically upheld the FCC's jurisdiction to promulgate regulations implementing the dialing parity requirements imposed by the Act. (Id. at *9.)

This decision appears to reinstate the FCC's dialing parity rules set forth in 47 CFR §§ 51.205-51.215, including the requirement that

> "A [Local Exchange Carrier] that does not begin providing in-region, interstate toll services in a state before February 8, 1999, must implement intraLATA and interLATA toll dialing parity throughout that state on February 8, 1999 or an earlier date as the state may determine, consistent with section 271(e)(2)(B) of the Communications Act of 1934, as amended, to be in the public interest." (47 CFR § 51.211(a).

In view of the Supreme Court decision, this Ruling withdraws the Draft Decision of Administrative Law Judge Walker dated January 7, 1999.

Nevertheless, I want to act promptly on the Petition to Modify the Commission's Decision (D.) 97-04-083 in light of the Supreme Court decision. Toward that end, I need and solicit the assistance of the parties.

First, I ask that Pacific Bell on Monday, February 8, 1999, file with the Commission in this proceeding its comments on when it intends to implement dialing parity in California in light of the Supreme Court decision and the FCC requirements on dialing parity. Additionally, the filing should state what reasonable adjustments Pacific Bell proposes with respect to the notice requirements set forth in the Ordering Paragraphs of D.97-04-083. This Ruling also directs Pacific Bell on February 8, 1999, to submit draft scripts to the Commission's staff that comply with the substantive provisions of Ordering Paragraph 14 of D.97-04-083. The substantive provisions of Ordering Paragraph 14 state:

> "[E]ach local exchange carrier will provide to the Commission Telecommunications Division and the Commission's Public Advisor copies of scripts that will be used by customer service representatives when handling questions regarding intraLATA presubscription. Staff will perform a one-time review of the scripts to assess whether they are competitively neutral, and will advise the carriers of any concerns it may have. Scripts will be deemed confidential, and the contents thereof will not be disclosed unless the Telecommunications Division seeks an order instituting investigation or takes further action with respect to such scripts before the Commission."

Second, I invite all parties to brief the subject of dialing parity requirements in light of the Supreme Court decision. The briefs should be thorough and complete, since (in my judgment) they will form the basis upon which the Commission will act with respect to the Petition to Modify. The briefs should address, but are not limited to, the following subjects:

- Is the Supreme Court decision self-executing with respect to the start of dialing parity, or are further orders or proceedings necessary?

- As a practical matter, given technical and other constraints on the parties, as well as time constraints on the Commission in issuing its

decisions, what date other than February 8, 1999, should the Commission consider if it considers a time certain for implementing dialing parity by Pacific Bell?

- What adjustments, if any, should be made in the notice requirements of D.97-04-083 in the implementation of dialing parity?

Parties also are invited to respond to Pacific Bell's reply brief, dated February 1, 1999, in which the company raises arguments that (i) dialing parity may be subject to further review by the Eighth Circuit Court of Appeals; (ii) the FCC rules on timing of dialing parity are merely guidelines for the states; (iii) state rules may differ from those of the FCC, so long as the state rules are not inconsistent with the Act, and (iv) the settlement agreement adopted in D.97-04-083 constitutes a waiver as to subsequent changes in the law.

Briefs dealing with these subjects should be filed on or before February 19, 1999.

Accordingly, **IT IS RULED** that:

1. The Draft Decision of Administrative Law Judge Walker dated January 7, 1999, is withdrawn.

2. Pacific Bell is directed to file comments on February 8, 1999, stating when it intends to implement dialing parity in California in light of the Supreme Court decision and the requirements of 47 CFR §§ 51.205-51.215.

3. Pacific Bell is directed to state in its comments what reasonable adjustments, if any, it proposes in complying with the notice requirements set forth in the Ordering Paragraphs of D.97-04-083.

4. Pacific Bell is directed on February 8, 1999, to submit draft scripts to the Commission's staff in compliance with the substantive provisions of Ordering Paragraph 14 of D.97-04-083.

I.87-11-033 JLN/GEW/tcg

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Assigned Commissioner's Ruling on all parties of record in this proceeding or their attorneys of record.

Dated February 3, 1999, at San Francisco, California.

Teresita C. Gallardo

Teresita C. Gallardo

NOTICE

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

5. All parties are invited to file comprehensive briefs on or before February 19, 1999, addressing (but not confined to) matters set forth in this ruling.

Dated February 3, 1999, at San Francisco, California.

JOSIAH L. NEEPER
Assigned Commissioner

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers	I. 87-11-033
And Related Matters (IntraLATA Presubscription Phase)	A. 85-01-034 A. 87-01-002 I. 85-03-078 I. 87-02-025 Case 87-07-024

COMMENTS OF AT&T COMMUNICATIONS OF CALIFORNIA, INC. (U 5002 C), CALTEL, MCI TELECOMMUNICATIONS CORP. (U 5011 C) AND SPRINT COMMUNICATIONS COMPANY, L.P. (U 5112 C) ON THE DRAFT DECISION OF ALJ WALKER MAILED JANUARY 7, 1999

AT&T Communications of California, Inc. (U 5002 C), CALTEL, MCI Telecommunications Corporation (U 5002 C), and Sprint Communications Company, L.P. (U 5112 C) ("Petitioners") submit these Comments on the Draft Decision of Administrative Law Judge Glen Walker mailed January 7, 1999 ("Draft Decision").

I. THE DRAFT DECISION SHOULD BE MODIFIED TO REFLECT THE SUPREME COURT'S RECENT DECISION IN AT&T CORP. V. IOWA UTILS. BD.

The Supreme Court has put to rest any lingering disputes over Pacific Bell's dialing parity obligations. On January 25, 1999, the Court also held that the Federal Communications Commission ("FCC") has general jurisdiction to promulgate regulations to enforce the Telecommunications Act of 1996 (the "Act"), including jurisdiction over intrastate telecommunications. *AT&T Corp. v. Iowa Utils. Bd.*, __ U.S. __, 1999 WL 24568, *6-*7 (January 25, 1999). In this regard, the Court specifically upheld the FCC's jurisdiction to promulgate regulations interpreting the dialing parity requirements imposed by the Act. *Id.* at *9 (upholding 47 CFR §§ 51.205-51.215).

The Act is clear. The dialing parity obligations imposed by Section 251(b)(3) apply to "all" LECs, including Pacific Bell. The exemption granted to Pacific Bell expires within three years of enactment (February 8, 1999). The FCC's binding regulations are likewise clear: "A LEC that does *not* begin providing in-region, interLATA or in-region, interstate toll services in a state before February 8, 1999, *must* implement intraLATA and interLATA toll dialing parity throughout the state on February 8, 1999 . . . ." 47 CFR § 51.211(a) (emphasis added). This provision describes Pacific Bell, and it ends any doubt that February 8, 1999 is the deadline for Pacific Bell to provide intraLATA toll dialing parity.

In light of the Supreme Court's decision, the Draft Decision reaches the wrong outcome. The Draft Decision interprets §§ 251(b)(3) and 271(e)(2)(B) of the Act to permit this Commission to excuse Pacific Bell from its obligation to provide dialing

parity by February 8, 1999. But the Supreme Court explicitly rejected arguments that Section 271(e)(2)(B) requires a state commission order to trigger the dialing parity obligation, and the FCC's *regulations* also require intraLATA toll dialing parity by February 8, 1999 at the latest. *Second Report and Order and Memorandum Opinion and Order* In the Matters of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 F.C.C.R. 19392 (August 8, 1996) ("*Second Report and Order*") ¶ 59(a), (b). Now that *AT&T* has confirmed that the FCC has general jurisdiction to enforce the Act, and has specifically held that its jurisdiction extends to both interstate and intrastate dialing parity, the FCC's regulations governing intraLATA dialing parity are binding upon Pacific Bell. *AT&T*, 1999 WL 24568 at *9 ("[S]ince the provision addressing dialing parity, § 251(b)(3), does not even mention the States, it is even clearer that the Commission's § 201(b) authority is not superseded [by state commissions].")

Any order by this Commission purporting to allow Pacific Bell to defer implementation of intraLATA toll dialing parity until some date after February 8, 1999, would be void: "[T]he 1996 Act does not authorize the Commission to give effect to a state order that purports to grant a BOC a deferral, waiver or suspension of the BOC's obligation to implement dialing parity." *Second Report and Order* ¶ 63. As the FCC has held: "Congress intended the dialing parity requirements that we adopt pursuant to section 251(b)(3) to apply, *without exception*, to *all* LECs with 2 percent or more of the Nation's subscriber lines." *Id.* (emphasis added) Although this Commission might disagree with the FCC's interpretation of the Act or its regulation, only a United States Court of Appeals can set aside an FCC regulation interpreting the Act. 47 U.S.C. § 402. Indeed, Pacific Bell and other incumbent LECs appealed to the Eighth Circuit all of the FCC regulations adopted pursuant to its Local Competition Order, including the regulations pertaining to dialing parity. The Eighth Circuit refused to vacate the FCC's

dialing parity regulations except to the extent they related to intrastate calls. That decision has now itself been reversed.

To bring the Draft Decision into conformity with federal law, Section 3A (pages 4-7) and Conclusions of Law 2, 3, 5 and 6 and Ordering Paragraph 1 should be stricken. Now that 47 CFR § 51.211(a) has been upheld by the highest court in the land, it is absolutely clear that February 8, 1999 is the mandatory deadline for Pacific Bell to provide intraLATA toll dialing parity. Similarly the discussion in Section 3b (pages 7-8) is no longer pertinent and should be stricken. Attached to these comments are proposed Conclusions of Law and Ordering Paragraphs consistent with these comments.

Finally, the record makes clear that there is no technology-related reason not to enforce the February 8, 1999 deadline. The Draft Decision properly recognizes that Pacific Bell is presently capable of implementing intraLATA toll dialing parity; indeed, even Pacific Bell did not dispute that fact.[1] Additionally, it is the petitioners' understanding that Pacific Bell has taken steps in preparation for providing intraLATA toll dialing parity by February 8, 1999. Given the clear mandate of the FCC regulations and the lack of any technical impediments to dialing parity, this Commission should do that which is necessary to see to it that Pacific Bell implements intraLATA toll dialing parity by February 8, 1999, or as soon thereafter as is possible.

More specifically, 47 CFR § 51.213 contemplates that state commissions will review and approve implementation plans to conform to the FCC's dialing parity requirements. A LEC's implementation plan is to include, among other things, "a proposed time schedule for implementation." 47 CFR § 51.213(b)(1). This Commission approved an implementation plan in D.97-04-083 that incorporates all of the details necessary to implement intraLATA equal access, except there is no time

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1 See Draft Decision at 7 (noting that the only dispute between the parties is a narrow one over some of the costs Pacific Bell will incur in implementing intraLATA toll dialing parity).

schedule for conversion of central offices that comports with the February 8, 1999 deadline.

Therefore, Petitioners ask that Pacific Bell be required to submit a "time schedule" consistent with its legal obligations, giving notice that Pacific Bell will in fact convert all of its central offices on February 8, 1999. Pacific Bell must be required to serve any compliance schedule it proposes on all certificated telecommunications carriers in California. Petitioners need this information to commence readying their operational systems to ensure orderly implementation of intraLATA equal access without service disruption to customers.

Initial customer notice and education should be left to the IXCs. The Commission should, nevertheless, require Pacific Bell to comply with its customer notice requirement as soon as possible after Pacific Bell's central offices have been converted.

In sum, the Commission should revise the Draft Decision to be consistent with the law as set forth in the decision of the Supreme Court; and it should require Pacific Bell to submit a time schedule for conversion of its central offices, as the FCC regulations require.

Attachment

Proposed Conclusions of Law and Ordering Paragraph

Conclusions of Law

1. Pacific has the duty under Section 251(b)(3) of the Telecommunications Act to provide intraLATA dialing parity in California.
2. The Commission in D.97-04-083 did not address the need for an alternative deadline for intraLATA dialing parity.
3. The petition for modification is untimely, but the Commission will not dismiss on that basis.
4. The United States Supreme Court has found that the FCC has jurisdiction to establish intrastate dialing parity regulations under the Telecommunications Act of 1996.
5. 47 CFR §51.211(a) requires that Pacific Bell implement intraLATA dialing parity throughout its service territory in California on or before February 8, 1999.
6. The Commission has the responsibility to oversee the details of intraLATA equal access implementation and approve implementation plans, consistent with 47 CFR §§51.211 and 51.213.

ORDER

IT IS ORDERED THAT:

1. Pacific Bell shall immediately verify to Petitioners and the Commission its intention to implement intraLATA dialing parity in California on February 8, 1999.
2. Pacific Bell shall immediately file with the Commission a time schedule it proposes for conversion of all its central offices to intraLATA equal access which complies as nearly as possible with the February 8, 1999 deadline. The time schedule shall be

provided to Petitioners and served on all certificated telecommunications carriers in California.

3. Pacific Bell shall comply with the Commission's customer notice requirement in D.97-04-083, Ordering Paragraph 8(a), as soon as possible after completing the conversion of its central offices to intraLATA equal access.

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers	I. 87-11-033
And Related Matters (IntraLATA Presubscription Phase)	A. 85-01-034 A. 87-01-002 I. 85-03-078 I. 87-02-025 Case 87-07-024

NOTICE OF ERRATA RE: COMMENTS OF AT&T COMMUNICATIONS OF CALIFORNIA, INC. (U 5002 C), CALTEL, MCI TELECOMMUNICATIONS CORP. (U 5011 C) AND SPRINT COMMUNICATIONS COMPANY, L.P. (U 5112 C) ON THE DRAFT DECISION OF ALJ WALKER MAILED JANUARY 7, 1999

AT&T Communications of California, Inc. (U 5002 C), CALTEL, MCI WorldCom, Inc., and Sprint Communications Company, L.P. (U 5112 C) ("Petitioners") hereby files the attached errata page 4 to the timely filed comments on the Draft Decision of Administrative Law Judge Glenn Walker mailed January 7, 1999 ("Draft Decision"). Petitioners inadvertently failed to incorporate corrections to citations in the comments found to be necessary in an earlier draft of the comments. By virtue of the fact that this is being hand delivered to Pacific Bell, no prejudice is suffered by Pacific Bell.

DATED: January 28, 1999

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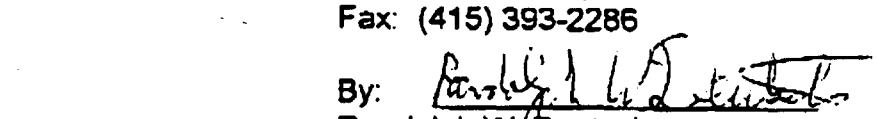
By: 
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **Notice of Errata re: Comments of AT&T Communications of California, Inc., CALTEL, MCI Telecommunications Corp., and Sprint Communications Company, L.P. on the Draft Decision of ALJ Walker mailed January 7, 1999 (I.87-11-033, et al.)** by mailing an addressed copy by first-class mail with postage prepaid to the official service list.

Executed on January 28, 1999, at San Francisco, California.

Katy M. Lindsay

BEFORE THE PUBLIC UTILITITES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers	)	I.87-11-033
	)	A.85-01-034
	)	A.87-01-002
And Related Matters (IntraLATA Presubscription Phase)	)	I.85-03-078
	)	I.87-02-025
	)	Case 87-07-024

PACIFIC BELL'S (U 1001 C) REPLY COMMENTS ON THE DRAFT DECISION OF ADMINISTRATIVE LAW JUDGE WALKER

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Attorneys for Pacific Bell

The Commission Decision at issue here (No. 97-04-083, April 23, 1997) determined, following hearings, that "Pacific Bell is required to implement intraLATA presubscription coincident with its parent company's entry into the long distance market" (p. 45) and included an implementation plan based, inter alia, on a Settlement Agreement among AT&T, MCI, Sprint, ORA and Pacific Bell. The parties to the Agreement, referring to §§ 271 and 272 of the Telecommunications Act, represented to the Commission that it was "consistent with the law," and it was incorporated into and approved by the Decision. E.g., p. 15, 43, Appx. A. The fundamental premise of both the Decision and the Settlement Agreement is that Pacific Bell's implementation of intraLATA presubscription would coincide with our ability to provide long distance service in California.[1]

The Draft Decision of Administrative Law Judge Walker addresses a petition filed by MCI, AT&T et. al. to modify the April Decision,[2] and the issue presented by the petition is whether §271(e)(2) of the Act requires the Commission to order Pacific Bell to implement intraLATA presubscription on February 8, 1999. The Draft Decision correctly concludes, based on the "plain meaning of the statutory language and the legislative history" of § 271 (p. 7), that the Act does not require implementation of intraLATA presubscription by that date. Draft Decision, pp. 5-8. The opposition comments do not contend that the Draft Decision has misread § 271.[3] Rather, relying on the Supreme Court's decision in AT&T Corp. v. Iowa Utils. Bd., __ U.S. ___ (January 25, 1999)

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[1] E.g., Joint Motion to Adopt Settlement Agreement Pursuant to Article 13.5 of the Commission's Rule of Practice and Procedures, Jan. 23, 1997, p. 6.

[2] The Draft Decision correctly concluded that the petition was "untimely" (p. 9), a conclusion the opposition does not challenge.

[3] Comments of AT&T Communications of California, Inc. (U 5002 C), MCI Telecommunications Corp. (U 5011 C) and Sprint Communications Company, L.P. (U 5112 C) on the Draft Decision of ALJ Walker ("AT&T" Com."), dated Jan. 27, 1999; Comments of the Office of Ratepayer Advocates on the Draft Decision of Administrative Law Judge Walker ("ORA Com."), dated Jan. 27, 1999.

upholding the FCC's general jurisdiction to issue rules interpreting the Act and the FCC's Second Report and Order (FCC 96-333, Aug. 8, 1996), the opposition parties erroneously contend that the FCC's rules are now "binding" on the Commission and that the Commission's April Decision if not revised, "would be void." E.g., AT&T Com., pp. 2-3; ORA Com., p. 3.[4] The opposition parties are wrong.

First, the opposition arguments assume (without any discussion) that the Supreme Court's decision immediately and automatically has reinstated the FCC's dialing parity and other rules. In fact, the Supreme Court has partially reversed the Court of Appeals judgments at 120 F.3d 753 and 124 F.2d 934, and remanded both cases to the Court of Appeals "for proceedings consistent with this opinion." AT&T Corp., Slip. Op., p. 30. The Supreme Court could have, remanded to the FCC or to the Court of Appeals with direction to remand to the FCC, but it did not. See, e.g., Addison v. Holly Hill Co., 322 U.S. 607, 623 (1944) (direct remand to lower court). The Supreme Court clearly has affirmed the FCC's authority to issue dialing parity and other rules that are consistent with and properly construe the Act. The merits of the FCC's rules may, however, be the subject of further proceedings before the Court of Appeals. For example, the Supreme Court upheld the FCC's pricing rules while acknowledging but not passing on the challenges to those rules in the Eight Circuit, the merits of which the Court said "are not before us." AT&T, Slip. Op., p. 6, n 3. Thus, there is further work to be done at the Court of Appeals.

Second, even if the dialing parity rules were not to be reviewed further by the Court of Appeals, this Commission would not be required to change its April 1997 Decision.

[4] AT&T et. als' eagerness here to embrace FCC rules is in sharp contrast to the position they are taking in the SBCS application proceeding (A. 96-03-007), where they ask the Commission to ignore the FCC's CPNI rules ." AT&T et. al., Comments on Alternate Decision of Commissioner Neeper, Jan. 21, 1999, p. 8.

As the Supreme Court's decision states, where the Act "entrusts state commissions with the job" (e.g., establishing prices) the FCC's general rulemaking authority is exercised "to guide the state-commission judgments." AT&T, Slip. Op., p. 17. The provision of the Act here at issue, § 271(e)(2)(B), unquestionably gives this Commission the authority to establish the timing of intraLATA presubscription on or after February 8, 1999 (the word "State" is used 7 times in that section and FCC not at all). As a result, any final FCC rules in this area are only "guides" to this Commission's implementation of intraLATA presubscription and are not mandatory.[5]

Third, the opposition arguments that the FCC rules are "mandatory" and preempt this Commission's April 1997 Decision, ignore other relevant provisions of the Act interpreted by the Eight Circuit and not disturbed on appeal. The FCC's First Report and Order stated that its rules were "binding" on the states (¶¶101-103), in effect preempting any state access and interconnection orders. The Eight Circuit, relying on §251(d)(3) (preservation of state access regulations), held that the FCC rules could not broadly preempt state decisions or rules that are otherwise consistent with the Act and the requirements of § 251. Iowa Utilities Bd. v. F.C.C., 120 F. 3d 753, 806-807 (8 Cir. 1997). The Eight Circuit vacated the FCC rules, and the FCC did not seek Supreme Court review of that portion of the opinion. The Commission's April 1997 Decision, as reaffirmed by the Draft Decision, properly interprets § 271 of the Act and does not "substantially prevent" implementation of the interconnection requirements of § 251. 47 U.S.C. §251 (d)(3)(c). The Draft Decision can therefore be adopted even if the FCC rules in their present form were to be reactivated.

[5] AT&T et. al. contend that the Supreme Court "explicitly rejected" (AT&T Com., p. 3) the Decision's interpretation of § 271. But the Supreme Court's decision does not refer to, much less discuss, § 271.

Fourth, there is a separate, independent state ground that requires the Commission to reject AT&T et. al.s' challenge to the Draft Decision. By entering into the Settlement Agreement and by their representations to the Commission regarding that Agreement, AT&T et. al. have expressly waived any rights they might have had to rely on any subsequent changes in the law. The Settlement Agreement, which imposes various obligations on Pacific Bell, was entered into on the express understanding, so represented to the Commission by the parties, that intraLATA dialing parity would be "coincident with" our exercise of interLATA authority. Supra, p.1, n. 1. No rights were reserved to modify the agreement. To the contrary, the parties assumed the risk of any such change, i.e., "each expressly assume the risk of any mistake of law or fact made by them or their counsel." Decision No. 97-04-083, Appx. A, p. 12.¶ P. AT&T et. al. are, moreover, in no position to object to sticking to their agreement. When Pacific Bell and the other BOCs agreed in interconnection agreements to combine UNEs, consistent with the FCC rules, and the Eight Circuit later invalidated the FCC rules (120 F. 3d 813), AT&T et. al. successfully argued that we were required to provide combinations.[6] The same result should follow here.

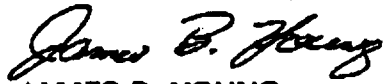
The basis of the Decision's resolution of disputed issues rested, moreover, on the parties' agreement on simultaneous interLATA entry and implementation of intraLATA presubscription. Because the parties agreed on the timing, Pacific's requests for pricing proceedings or regulatory safeguards to protect Pacific's revenues were not considered. I.97-04-083, Mimeo Op., p. 10. Additionally, it was in the context of simultaneous

[6] E.g., Joint Prehearing Statement of AT&T Communications, Inc. (U 5002 C) and MCI Telecommunications Corporation (U 5011 C) Pursuant to the March 4, 1998, Administrative Law Judge's Ruling, dated March 11, 1998, pp. 3-6 (arguing that Commission could not depart from "express provisions" of agreements and "parties intentions in forming" them).

interLATA entry and presubscription that the Commission ordered neutral business office practices for Pacific and extensive customer notification by Pacific. The Commission cannot eliminate the market parity that is at the core of the decision without hearings addressing all issues.[7]

For the reasons stated above, the Commission should adopt the Draft Decision of Administrative Judge Walker that correctly rejects the petition to modify the April 1997 Decision.

Dated at San Francisco, California, this 1ST day of February, 1999.



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Attorneys for Pacific Bell

[7] ORA and AT&T et. al. would have the Commission require us to implement the various procedures in the April Decision designed to "protect" our competitors, when we would not even be in the market. ORA Com., p. 3; AT&T Com., p. 5

CERTIFICATE OF SERVICE

I, Gina Lee certify that the following is true and correct:-

I am a citizen of the United States, State of California, am over eighteen years of age, and am not a party to the within cause.

My business address is 140 New Montgomery Street, San Francisco, California 94105.

On February 1, 1999, I served the attached Pacific Bell's Reply Comments on the Draft Decision of Administrative Law Judge Walker in I.87-11-033 by placing true copies thereof in envelopes addressed to the parties in the attached list, which envelopes, with postage thereon fully prepaid, I then sealed and deposited in a mailbox regularly maintained by the United States Government in the City and County of San Francisco, State of California.

Executed this 1st day of February, 1999, at San Francisco, California.

PACIFIC BELL
140 New Montgomery Street
San Francisco, CA 94105

By: Gina Lee
Gina Lee

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF MCI TELECOMMUNICATIONS CORPORATION AND AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., FOR AN ORDER REQUIRING SOUTHWESTERN BELL TELEPHONE COMPANY TO IMPLEMENT INTRALATA TOLL DIALING PARITY IN ACCORDANCE WITH THE COMMISSION'S RULES AND FEDERAL STATUTE.	)	Cause No. PUD980000525 Order No. 430071

HEARING: January 14, 1999 before the Administrative Law Judge
February 2, 1999 before the Oklahoma Corporation Commission en banc

APPEARANCES: Ronald E. Stakem, Jack G. Clark, Jr., and Edward J. Cadieux, Attorneys,
MCI Telecommunications Corporation
David Dykeman, Senior Attorney
Office of the General Counsel,
Public Utility Division,
Oklahoma Corporation Commission
Deborah R. Morgan, Assistant Attorney General,
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Charles J. Scharnberg, Attorney,
Southwestern Bell Telephone Company
Marc Edwards and Michelle Bourianoff, Attorneys,
AT&T Communications of the Southwest, Inc.
Martha Jenkins and Nancy Thompson, Attorneys,
Sprint Communications Company L.P.
Dallas E. Ferguson, Attorney,
WorldCom, Inc.
Rick D. Chamberlain and Mark E. Garrett, Attorneys,
Cox Oklahoma Telecom, Inc.

ORDER

BY THE COMMISSION:

The Corporation Commission of the State of Oklahoma ("Commission") being regularly in session and the undersigned Commissioners being present and participating, there comes on for consideration and action the appeals from the Report and

Recommendations of the Administrative Law Judge ("Report") issued on January 20, 1999, regarding the Application of MCI Telecommunications Corporation ("MCI"), an MCI WorldCom Company, requesting the Commission to issue an Order requiring Southwestern Bell Telephone Company ("SWBT") to implement intraLATA toll dialing parity in Oklahoma coincident with SWBT's, or any of its affiliate's, entry into the Oklahoma interLATA market or no later than February 8, 1999, whichever is earlier, and to grant such other and further relief as the Commission deemed appropriate.

Procedural History and Summary of Evidence

The "Procedural History" and the "Summary of the Testimony and Positions of the Parties" as stated on pp. 1-15 of the Report and Recommendations Of The Administrative Law Judge ("Report") issued on January 20, 1999, are, except to the extent otherwise stated herein, adopted by the Commission and incorporated herein.

Both SWBT and MCI filed appeals to that Report and Recommendations. Both appeals cited the decision of the Supreme Court of the United States in AT&T Corp. et al. v. Iowa Utilities Board, et al., ____ U.S. ____ (1999) issued on January 25, 1999 (after the Report was issued in this cause), and cited provisions of the Telecommunications Act of 1996 (particularly §§ 252 and 271) and relevant Federal Communications Commission ("FCC") rules on intraLATA toll dialing parity (47 C.F.R. §§51.205-51.215). In short, SWBT maintained the Commission could not order implementation of intraLATA toll dialing parity on February 8, 1999 pursuant to the Telecommunications Act of 1996 and 47 C.F.R. §51.211 (a), if that rule was reinstated as to substance by the Supreme Court, because SWBT had not yet filed, and the Commission had not approved, an implementation plan as required by 47 C.F.R. §51.213(a). Moreover, SWBT argued the Commission could and should delay intraLATA toll dialing parity until SWBT has been granted authority to provide in-region interLATA telecommunications services under the Act. On the other hand, MCI, Sprint Communications Company, L.P. ("Sprint"), the Attorney General, and the Staff of the Public Utility Division of the Commission ("Staff") maintained the Commission must or, in any event, should order implementation on February 8, 1999, and should do so on the terms of an implementation plan that the Commission imposes on SWBT, such plan to be modeled after the methods of implementing intraLATA equal access used in the past for other LECs in Oklahoma. AT&T Communications of the Southwest, Inc. ("AT&T") maintained such implementation must occur by February 8, 1999.

The Commission, after extensive argument and questioning from each Commissioner, encouraged the parties to negotiate and to resolve issues relating to an implementation plan and time schedule. The Commission recessed the proceedings to permit such negotiations. After lengthy private negotiations, the Commission was notified an

agreement in principle had been reached and the Commission reconvened the hearing. The agreement in principle was presented, discussed, and agreed to by all of the parties present, viz. MCI, Sprint, the Attorney General, and the Staff, except AT&T.

Subsequently, the agreement in principle was reduced to a written Agreement and Stipulation. That Agreement and Stipulation is attached hereto as Exhibit "A" and made a part hereof.

Findings of Fact and Conclusions of Law

The Commission has jurisdiction to grant the relief sought in this Application by MCI pursuant to Article 9, §18 of the Constitution of the State of Oklahoma and pursuant to the Telecommunications Act of 1996. For the reasons stated by the ALJ in his Report and Recommendations it is in the best interest of the public in Oklahoma to implement intraLATA toll dialing parity as soon as is reasonably possible.

The Commission has carefully considered various ideas (some of which were suggested by the parties and others of which were generated by the Commissioners themselves) for the orderly implementation of intraLATA toll dialing parity in an effort to craft an implementation plan for the good of the Oklahoma public and, at the same time, insure fairness to all affected companies. Now, the Commission has carefully considered the negotiated proposed Agreement and Stipulation and finds that it is fair and reasonable and should be adopted as an implementation plan. In reaching that conclusion, the Commission expresses its appreciation for the industry's cooperation in reaching a responsible agreement.

Order

IT IS THEREFORE THE ORDER OF THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA THAT:

1. The appeals of SWBT and MCI are resolved by this Order.

2. The proposed Agreement and Stipulation is approved and the parties are ordered to implement intraLATA toll dialing parity in Oklahoma in accordance with that Agreement and Stipulation. This Order, together with that Agreement and Stipulation, and the form of notice to customers shall constitute the Commission's approved implementation plan within the meaning of 47 C.F.R. §51.213.

3. The implementation of intraLATA toll dialing parity in Oklahoma pursuant to this Order supersedes all dialing pattern

limitations previously imposed by the Commission as limits on the state-wide authority already granted to IXCs to operate in this state.

OKLAHOMA CORPORATION COMMISSION

ED APPLE, Chairman

BOB ANTHONY, Vice Chairman

DENISE BODE, Commissioner

DONE AND PERFORMED THIS 8th DAY OF FEBRUARY, 1999, BY ORDER OF THE COMMISSION:

CHARLOTTE W. FLANAGAN, Secretary

Agreement and Stipulation

Cause No. PUD 980000525

This Agreement and Stipulation ("Stipulation") is entered into by the parties who are signatories hereto on or about February 8, 1999. In consideration of the mutual agreements and contemplated action by the Oklahoma Corporation Commission, the signatories agree on the following terms of the Stipulation.

1. The purpose of the Stipulation is to resolve the specific issues involved in Cause No. PUD 980000525, including those issues raised on appeal thereof and arising out of the January 25, 1999, decision of the Supreme Court of the United States in AT&T Corp., et al. v. Iowa Utilities Board, et al., ____ U.S. ____ (1999) relating to the Telecommunications Act of 1996 and the FCC's rules on intraLATA toll dialing parity, particularly 47 CFR §§51.205-51.215 (1997).

2. Southwestern Bell Telephone Company ("SWBT") will activate intraLATA toll dialing parity functionality in its Oklahoma network on February 8, 1999.

3. SWBT will begin processing intraLATA primary interexchange carrier ("PIC") changes in Oklahoma on March 25, 1999. Such changes are to be made for any customer who authorizes such a change, notwithstanding that customer and all others may not or have not first received a direct bill notice on the approved form pursuant to the procedures agreed to in paragraphs 4 and 5 hereof.

EXHIBIT "A"

4. During the forty-five day period from February 8, 1999 to March 25, 1999, the following additional implementation steps are planned:

A. The Oklahoma Corporation Commission ("Commission") will design and implement its own public information campaign to promote customer awareness of the opportunity to choose a primary interexchange carrier for 1+ intraLATA telecommunications service in Oklahoma; and

B. SWBT will provide notice of the implementation of intraLATA toll dialing parity to all interexchange carriers ("IXCs") and competitive local exchange carriers ("CLECs") known to be providing service in Oklahoma at this time.

C. A form of direct bill notice to be given to SWBT's customers will be approved in accordance with paragraph 5 herein and SWBT will cause that approved form of notice to be inserted in its regular bills to customers beginning on or about February 21, 1999, and continuing thereafter in accordance with SWBT's existing billing cycle until all customers have been sent the approved form of notice.

5. The form of notice shall be modeled on those forms of notice previously approved by the Commission and shall be modified only as necessary for the circumstances of this particular case. SWBT will propose an initial draft of the form of notice and circulate it to all parties for review. Any disputes regarding the text of the form of notice shall be presented to and resolved by the Administrative Law Judge ("ALJ") at the regular motion docket on February 11, 1999.

6. An IXC may submit to SWBT for processing any PIC change on or after March 25, 1999; provided, however, if the customer's authorization to make the PIC change was obtained by an IXC before February 8, 1999, the IXC must first notify the customer that the PIC change will be made before submitting the PIC change to SWBT for processing. Such customer notice may be, at the IXCs' choice, by telephone or in writing. Nothing in this Stipulation is intended to modify, supersede, or supplant extant rules or orders regarding the methods of acquiring or verifying PIC change authorizations.

7. By agreeing to this Stipulation and intraLATA toll dialing parity implementation plan, no signatory concedes that the positions expressed by others on any issue or the plan adopted herein are based on a proper interpretation of applicable state or federal law or judicial precedent. Each signatory also agrees that the fact this Stipulation was signed to resolve disputes in Oklahoma should have no precedential impact concerning similar disputes in any other jurisdiction.

8. This Stipulation is the entire agreement of the signatories and if it is not adopted by the Commission in toto, then the Stipulation is null and void and no signatory to the Stipulation will be bound by any of the provisions herein.

9. If the Stipulation is adopted in toto by an otherwise final Order of the Commission, each of the signatories agrees not to appeal such an order to the Supreme Court of the State of Oklahoma or to any other court. The parties waive no other rights

under the law including, but not limited to, making application for relief based on changed circumstances.

For the Oklahoma Corporation Commission
Public Utility Division

By: David B Dykeman Date: 2/8/99
Attorney

For Southwestern Bell Telephone Company

By: [signature] Date: 2/8/99
Attorney

For AT&T Communications of the Southwest, Inc.

By: _____ Date: _____

For MCI Telecommunications Corporation

By: Ronald E. Stakem Date: 2/8/99
its attorney

For Sprint Communications Company, L.P.

By: Martha Jenkins by RES Date: 2/8/99

For WorldCom, Inc.

By: Ronald E Stakem, Date: 2/8/99
its attorney

For Office of the Attorney General
State of Oklahoma

By: DPM Date: 2/8/99
Assistant Attorney General

For Cox Oklahoma Telecom, Inc.

By: _____ Date: _____

Paul G. Lane
General Counsel-
Missouri

Southwestern Bell Telephone
One Bell Center, Room 3520
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Phone 314 235-4500
Fax 314 247-0014

Southwestern Bell

February 8. 1999

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, Floor 5A
Jefferson City, Missouri 65101

Re: Case No. T0-99-125

Dear Judge Roberts:

Enclosed, for filing in the above-captioned case, are an original and fourteen copies of Southwestern Bell Telephone Company's Proposed Procedural Schedule.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Paul G. Lane

Enclosure

cc: All Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Petition of MCI Telecommunications Corporation to Require Southwestern Bell Telephone Company to Implement IntraLATA Presubscription No Later Than February 8, 1999.	))))	Case No. TO-99-125

SOUTHWESTERN BELL TELEPHONE COMPANY'S
PROPOSED PROCEDURAL SCHEDULE

COMES NOW Southwestern Bell Telephone Company (SWBT) and respectfully requests the Commission to adopt the procedural schedule discussed herein.

1. In its Order of January 12, 1999, the Commission directed the parties to participate in a prehearing conference on January 28, 1999 and to submit a proposed procedural schedule to the Commission on February 8, 1998.

2. At the prehearing conference, it became apparent that the petitioner MCI and SWBT had radically different views of the scope of this case. As MCI will no doubt advise the Commission, MCI is of the view that the Supreme Court decision in AT&T Corporation v. Iowa Utilities Board, _____U.S. _____, slip opinion, January 25, 1999, moots every issue in this case except the contents of a plan to implement 1+ intraLATA toll presubscription in Missouri by February 8, 1999. (January 28, 1999 Prehearing Conference, T. 7-8). SWBT strongly disagrees with MCI's characterization of the impact of the Iowa Utilities Board case, and specifically disagrees with the notion that the Commission is required to order the implementation of intraLATA toll presubscription before SWBT has received interLATA authority and before the fate of the primary toll

carrier plan (PTC plan) is decided. (January 28, 1999 Prehearing Conference, T. 9-12). SWBT has previously advised the Commission of its view that implementation of 1+ presubscription before SWBT has received interLATA toll authority would place it at a severe competitive disadvantage, and that it was also inappropriate to require 1+ presubscription while SWBT labored under the burden of subsidizing the secondary carriers under the PTC plan. See Opposition of SWBT to the Petition of MCI, filed October 9, 1998. Nothing in the Iowa Utilities Board decision changes those views.

3. MCI seizes upon the Iowa Utilities Board decision to reverse the 8th Circuit's order[1] which vacated the FCC's dialing parity rules contained at 47 C.F.R., §51.205-51.215. But MCI ignores several critical aspects of the decision in its zeal to require SWBT to implement 1+ presubscription.

The Decision is Not Yet Final

4. Initially, it must be noted that the Iowa Utilities Board decision is not yet final. Pursuant to Supreme Court Rule 45, the decision does not become final until 25 days after issuance, and the decision is stayed by any petition for rehearing that is filed. Given that the decision was not issued until January 25, 1999, it will not become final until February 19, 1999, and then only if no petition for reconsideration is filed. It is obviously necessary for the Supreme Court process to be completed before seeking to implement the decision.

The Remand Must be Permitted to Take Effect

5. Once the Supreme Court's decision becomes final, the matter will be

[1] People of the State of Cal. v. F.C.C., 124 F.3d 934 (8th Cir. 1997).

remanded to the 8th Circuit for consideration of any substantive matters which were not considered because of the 8th Circuit's decision that the FCC was without jurisdiction. The Supreme Court determined only that the FCC had jurisdiction to order dialing parity rules, it did not address any substantive challenges to those rules. Instead, it remanded the case to the Eighth Circuit "for proceedings consistent with this opinion". (Iowa Utilities Board, Slip Op. at 11). Now that the Supreme Court has determined the jurisdictional question, the 8th Circuit must deal with any substantive challenges to those FCC rules.

6. In addition, when the Supreme Court decision becomes final, the FCC must also be permitted an opportunity to address the issue. As the Commission is aware, compliance with the literal terms of 47 C.F.R. §51.205-51.215 is impossible given that the February 8, 1999 deadline will shortly expire. Either concurrent with or following the remand to the 8th Circuit, it is quite likely that the FCC will address this issue. For example, the FCC itself may wish to clarify the scope of its guidelines to the state commissions in recognition of the passage of the February 8 date. It is appropriate to permit the 8th Circuit and the FCC to address this matter before the Commission attempts to determine the impact of the Supreme Court decision.

The PSC is Not Deprived of Its Authority to Determine the Timing of 1+ Presubscription

7. Assuming the decision becomes final, and the 8th Circuit remand does not affect the impact of the FCC's rules, the impact must then be determined. Contrary to MCI's position, the Supreme Court was careful to note that the dialing parity rules provide guidelines to state commissions, not a mandate that implementation take place by February 8, 1999. The discussion of dialing parity in the Supreme Court's decision is

fairly short, but makes clear that the rules which had been vacated by the 8th Circuit were guidelines for state commissions to follow, not absolute mandates.

> For similar reasons, we reverse the Court of Appeal's determination that the Commission had no jurisdiction to promulgate rules regarding state review of pre-existing interconnection agreements between incumbent LECs and other carriers, regarding rule exemptions, and regarding dialing parity. See 47 C.F.R., §51.303, 51.405, and 51.205-51.215 (1997). None of the statutory provisions that these rules interpret displaces the Commission's general rulemaking authority. While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements, 47 U.S.C., §252(e)(1994 ed., Supp. II), and granting exemptions to rural LECs, §251(f), these assignments, like the rate-establishing assignment just discussed, do not logically preclude the Commission's issuance of rules to guide the state-commission judgment. And since the provision addressing dialing parity, §251(b)(3), does not even mention the State, it is even clearer that the Commission's §201(b) authority is not superceded. AT&T Corp. v. Iowa Utilities Board, slip opinion at p. 6. (emphasis added)

Thus, the terms of the Supreme Court's decision makes clear that the FCC's authority is limited to providing guidelines to the state commission in issuing decisions. This Commission is not deprived of the right to consider public interest issues and fairness issues, including whether it is appropriate to require 1+ intraLATA toll presubscription before SWBT has interLATA authority and before the fate of the PTC plan has been determined.

8. It is also clear that the Supreme Court did not intend its decision to have a preclusive effect on the states because it did not even mention §271(e)(2)(B), which unquestionably gives the states the authority to establish the timing of intraLATA dialing parity on or after February 8, 1999. The 8th Circuit held that the FCC may not generally preempt state rules which are otherwise consistent with the Telecommunications Act of

1996. Iowa Utilities Board v. FCC, 120 F3d 753, 807 (8th Cir. 1997). This part of the 8th Circuit's opinion was not reversed by the Supreme Court. The Supreme Court's failure to discuss §271(e)(2)(B) is a clear indication of the continued vitality of that section and of the state commission's continued authority over the timing of intraLATA presubscription.

It Would Be Inappropriate to Treat SWBT Differently Than Other Incumbent Local Exchange Companies (ILECs) in Missouri

9. If MCI were correct in its interpretation of the Supreme Court decision, then the FCC Rule on which it relies must be applied equally to SWBT along with the independent telephone companies in Missouri. With regard to those local exchange telephone companies in Missouri, which serve more than 2% of the access lines on a nation-wide basis (i.e., Sprint and GTE), there is no exemption available under the statute. Only the small local exchange telephone companies serving less than 2% of the access lines in the country are eligible for an exemption[2] and this Commission has already determined that the exemption which it granted should be terminated. In its Order of May 22, 1997 in Docket TO-97-217/TO-97-220, the Commission required small telephone companies to implement intraLATA presubscription by April 1, 1998. In its Order of March 12, 1998 in Docket TO-97-217/TO-97-220, the Commission extended the exemption to June 1, and required complete implementation of 1+ presubscription by December 1, 1998. This March 12th Order is no longer effective, since it was vacated by the Cole County Circuit Court in Case No. CV198-666CC, but even if it had continued validity, the exemption would have expired by its terms on December 1, 1998.

[2] Section 251(f)(2).

These carriers are not in a different position than SWBT, and should be subject to the same treatment. While these carriers have implemented presubscription in some areas, they have not completed the task because of the issues surrounding community optional service (COS) and the PTC plan. These issues affect SWBT at least to the same degree as the other Missouri ILECs.

MCI proposes to single out SWBT for special treatment and require immediate implementation of 1+ presubscription, while the other incumbent local exchange companies in Missouri would be free to continue under the current system. This selective enforcement of MCI's interpretation of the rules is not only inappropriate, but also unlawful. If MCI were correct in its interpretation of the effect of the Supreme Court's decision, then all ILECs in Missouri are subject to the FCC's rules and should be treated equally and on the same schedule. To do otherwise is inconsistent with the requirements of equal protection guaranteed by both the Missouri and United States Constitutions. It would also be inconsistent with the appropriate treatment of Missouri consumers, as all should be equally subject to the benefits and burdens of intraLATA toll presubscription.

MCI's Proposed Procedural Schedule

10. MCI's proposed procedural schedule permits only one issue to be examined by the Commission, i.e., what should the components of SWBT's implementation plan be. This limited analysis would deprive the Commission of its ability under state law and under §271(c)(2)(B) to determine the timing of SWBT's provision of 1+ intraLATA toll. The Commission has been zealous in guarding its rights under the Telecommunications Act of 1996, and should continue to do so.

11. Under MCI's proposal, the Commission would not even hear evidence which SWBT would offer to show that it should not be required to provide 1+ intraLATA toll service until such time as it has authority to provide interLATA toll service. Moreover, SWBT would be deprived of the opportunity to demonstrate to the Commission that the PTC plan should be brought to an end prior to the provision of 1+ presubscription. Under MCI's proposal, SWBT would be burdened with the requirement to provide 1+ intraLATA toll service to secondary carriers (where the cost of access alone exceeds the revenues received), while losing the right to be the sole provider of more profitable 1+ service to its own customers. SWBT can hardly be expected to bear the burden of unprofitable toll service to secondary carrier customers without the benefit of the more profitable 1+ service to its own customers that recoups the lost subsidy.

SWBT's Procedural Proposal

12. SWBT proposes the following schedule:

Simultaneous Direct	April 22, 1999
Simultaneous Rebuttal	May 27, 1999
Hearing Memorandum	June 16, 1999
Hearing	June 21-25, 1999

13. Under SWBT's proposal, the Commission would have its full right to examine all of the issues which the parties seek to present. This schedule permits full development of the issues in prefiled testimony, with a hearing to be conducted shortly after the conclusion of the PTC remand docket. This would permit the Commission to take into account all relevant circumstances, including the resolution of the PTC plan case, in making its decision in the 1+ presubscription case. Moreover, this procedural

schedule would permit the Supreme Court order to become final. and would permit the 8th Circuit and FCC the time to take appropriate steps in response to the Supreme Court's decision concerning intraLATA dialing parity. This proposed procedural schedule would avoid the very real possibility that subsequent orders from the 8th Circuit or the FCC would impact the Commission's decision and require revisions.

WHEREFORE, for all the foregoing reasons, SWBT respectfully requests the Commission to reject the single issue hearing proposed by MCI, and to conduct a complete analysis pursuant to the procedural schedule proposed by SWBT.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By Paul G Lane

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the Service List by first-class postage prepaid. U.S. Mail this 9th day of February, 1999.

Paul N. Jones

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of MCI Telecommunications Corporation to Require Southwestern Bell Telephone Company to Implement IntraLATA Presubscription No Later Than February 8, 1999.	)))))	Case No. TO-99-125

JOINT MOTION FOR IMMEDIATE DECLARATORY RULING AND ESTABLISHMENT OF PROCEDURAL SCHEDULE

COME NOW, AT&T Communications of the Southwest, Inc. (AT&T) and MCI Telecommunications Corporation, an MCIWorldCom Company (MCI), collectively Joint Movants, and file this Joint Motion for Immediate Declaratory Ruling and Establishment of Procedural Schedule, and, in support thereof, state as follows:

1. On January 25, 1999, the United States Supreme Court issued a ruling in *AT&T Corp. v. Iowa Utils. Bd.*[1] A copy of that decision is attached hereto as Appendix "A" for the convenience of the Commission. In its decision, the Court addressed, *inter alia*, the authority of the Federal Communications Commission (FCC) to issue the dialing parity rules set forth in its Second Report and Order.[2] The Court reversed the Eighth Circuit's decision[3] which held the FCC's rules invalid and beyond the FCC's jurisdiction to the extent they

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[1] __ U.S. ____, 1999 WL 24568 (1999).

[2] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, rel. Aug. 8, 1996.

related to intrastate intraLATA dialing parity.[4] The Supreme Court not only held that the FCC's rules were a valid exercise of the FCC's jurisdiction, but also that the FCC's rules established the boundaries of permissible state commission action.[5] The Supreme Court noted that because the provision of the Federal Telecommunications Act of 1996 (FTA), addressing dialing parity, section 251(b)(3), does not even mention the States, it is even clearer that the FCC's authority to promulgate rules on that subject was not superseded. Consequently, both this Commission and Southwestern Bell Telephone Company (SWBT) are bound by the FCC's determination that, pursuant to section 251(b)(3) of the FTA, all local exchange companies, including SWBT, must provide intrastate and interstate intraLATA dialing parity no later than February 8, 1999.[6] Clearly, the Supreme Court's decision confirms that Joint Movants correctly demand that SWBT implement intraLATA presubscription no later than February 8, 1999. Indeed, Petitioner MCI's prayer in the instant case was that the Commission issue its Order requiring SWBT to implement intraLATA presubscription in Missouri no later than February 8, 1999 whichever earlier.

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3 *California v. FCC*, 124 F.3d 934 (8th Cir. 1997).

4 ____ U.S. at ____, slip op. at 17.

5 ___ U.S. at ___, slip op. at 17 and n. 5 and 10.

[6]The FCC rule addressing the implementation schedule for dialing parity, 47 CFR 51.211, provides in the pertinent part as follows:

> "(a) A LEC that does not begin providing in-region, interLATA or in-region, interstate toll services in a state before February 8, 1999, must implement intraLATA and interLATA toll dialing parity throughout that state on February 8, 1999 or an earlier date as the state may determine, consistent with section 271(e)(2)(b) of the Communication Act of 1934, as amended, to be in the public interest."

By its clear terms, the language of this rule is mandatory rather than permissive and thus there is no latitude for delaying the prescribed implementation schedule.

SWBT could, of course, eliminate the need for Commission action in this regard by simply complying with the law on February 8. However, based on statements by SWBT representatives, Joint Movants expect SWBT to fail to comply with the February 8 deadline.

2. Although it is now clear that, as a matter of federal law, SWBT is required to implement intraLATA presubscription no later than February 8, 1999, the Commission should confirm this obligation in the state of Missouri by issuing an immediate declaratory order in this proceeding. Even though the lawfully prescribed date will have passed, such an order would help ensure that there is no further unwarranted delay in the implementation of intraLATA presubscription.

3. In particular, the Commission should confirm that SWBT is required to activate intraLATA presubscription functionality on all of SWBT's switches immediately. In addition, SWBT should be required to accept intraLATA PICs from any carrier that has made arrangements with SWBT to provide interLATA services to SWBT's local exchange customers, using the submission and verification procedures currently available for interLATA PIC changes.

4. The Commission should also order SWBT to file its implementation plan immediately. SWBT was supposed to have filed that plan at least 6 months ago and has no excuse for its failure to do so, particularly in light of its pending request for its relief under Section 271. SWBT has always known that even in the absence of the FCC's rule, it would have to implement intraLATA presubscription with any relief under Section 271.

5. After SWBT has come into minimal compliance with the Federal mandate for intraLATA dialing parity, Joint Movants recommend that the Commission establish a new

docket to address customer notice and any additional post-activation implementation issues.

The following procedural schedule should be adopted for use in the new docket:

March 15. 1999	SWBT Direct testimony
March 30. 1999	Rebuttal testimony
April 13, 1999	Surrebuttal and cross surrebuttal testimony
April 14, 1999	Hearing memorandum
April 19-23, 1999	Hearings

By issuing the immediate declaratory ruling and implementing the foregoing schedule, the Commission can fulfill the mandate of section 251(b)(3) of the FTA, and customers can benefit from increased intraLATA choice as rapidly as possible.

WHEREFORE, Joint Movants respectfully submit that SWBT is obligated to immediately activate intrastate intraLATA presubscription and file its implementation plan and respectfully request that the Commission immediately confirm this obligation. Joint Movants further request that the Commission create a new docket and adopt the procedural schedule suggested herein to address additional post-activation implementation issues.

Respectfully submitted,

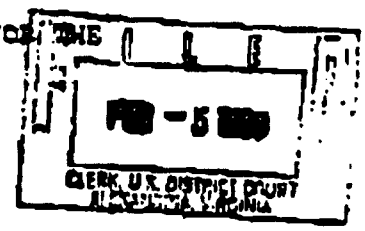
Paul S. DeFord #29509
Lathrop & Gage
2345 Grand Boulevard, Suite 2500
Kansas City, MO 64108
816-292-2000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Joint Movants' Motion for Immediate Declaratory Ruling and Establishment of Procedural Schedule has been sent to all parties of record by courier receipted delivery, by first class U.S. mail, or by facsimile transmission on the 8th day of February, 1999.

Paul S. DeFord

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division



AT&T COMMUNICATIONS OF VIRGINIA, INC.,

Plaintiff,

v. Civ. Action No. 98-1721-A

BELL ATLANTIC-VIRGINIA, INC.,

Defendant.

MEMORANDUM OPINION

Before the Court are the parties' cross-motions for summary judgment. There are three issues now before the Court: (1) whether a settlement agreement between the parents of these parties prohibits AT&T Communications of Virginia, Inc. (AT&T) from bringing this action; (2) whether this action should be dismissed without prejudice as a result of the Supreme Court's recent decision in AT&T Corp. v. Iowa Util. Bd., ___ U.S. ___, 1999 WL 24568, (1999); and (3) whether the Telecommunications Act of 1996 (1996 Act) requires Bell Atlantic-Virginia, Inc. (Bell Atlantic) to offer dialing parity for intrastate intraLATA toll calls in the absence of implementing regulations by the FCC or the Virginia State Corporation Commission. The parties agree that there are no disputes as to material facts and we find the issues ripe for summary judgment.

BACKGROUND

LATAs (local access transport areas) are contiguous geographical areas by which telephone service is organized. Most states have more than one LATA and some LATAs cover parts of more than one state. Long-distance calls are those between two LATAs, or interLATA calls. Local calls are calls within a close geographical area that is generally smaller than a single LATA. IntraLATA toll calls are calls within the same LATA but beyond the range for local calls. The instant action is solely concerned with intrastate intraLATA toll calling.

After the break-up of AT&T in 1982, Bell Atlantic and other Bell operating companies (BOCs)[1] were granted monopolies in intraLATA toll markets but were prohibited from carrying interLATA toll calls. In 1995, the Virginia State Corporation Commission (SCC) partially eliminated Bell Atlantic's monopoly by authorizing other carriers to provide intraLATA toll calls, but only on an access code basis. This means that while Bell Atlantic is the default carrier when a customer dials "1" plus the area code and phone number, that customer can use the services of a seperate

[1] BOCs constitute a subset of local exchange carriers (LECs) with special responsibilities and protections under the 1996 Act. Bell Atlantic is an LEC, a BOC, and an incumbent local exchange carrier under the 1996 Act.

carrier by first dialing an access code, usually in the form "10-10-###". Implementation of 'dialing parity' means offering customers the choice of presubscribing, or choosing a different carrier to be the default carrier for toll calls. Bell Atlantic has not implemented dialing parity for intrastate intraLATA toll calls.

On February 8, 1996, Congress passed the 1996 Act in order "to foster competition in local telephone service." GTE South Inc. v. Morrison, 957 F. Supp. 800, 801 (E.D. Va. 1997). In doing so, it "ended the longstanding regime of state-sanctioned monopolies . . . [by] fundamentally restructur[ing] local telephone markets." AT&T Corp. v. Iowa Util. Bd., ___ U.S. ___, 1999 WL 24568, *3 (1999). "States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry." Id. One of these duties applicable to all LECs is "[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service". 47 U.S.C.A. § 251 (Supp. 1998). Another provision of the 1996 Act requires BOCs that exercise the authority to provide interLATA (i.e., long distance) services to provide intraLATA toll dialing parity. See id. at § 271 (e)(2)(A). However, BOCs that were not required to implement intraLATA toll

dialing parity by December 19, 1999 and that are not located in single-LATA states are protected from any state action requiring implementation of intraLATA toll dialing parity until the earlier of their being authorized to provide interLATA services or February 8, 1999. See id. at § 271(e)(2)(B).

In accord with its obligations under the 1996 Act, see id. at § 251(d)(1), the FCC promulgated regulations providing that "[a] LEC that does not begin providing in-region, interLATA or in-region, interstate toll services in a state before February 8, 1999, must implement intraLATA and interLATA toll dialing parity throughout that state on February 8, 1999 . . . ." 47 C.F.R. § 51.211 (1997). Consistent with the FCC regulations, Bell Atlantic submitted an IntraLATA Presubscription Implementation Plan to the Virginia SCC on December 6, 1996. The Virginia SCC approved this plan on May 9, 1998 in and order requiring intraLATA toll dialing parity by February 8, 1999.

Lawsuits filed by incumbent LECs across the country challenging the FCC's regulations, including § 51.211, were consolidated in the United States Court of Appeals for the Eighth Circuit. In August 1997, that Court vacated the FCC's regulations as they affected intrastate communications, finding that the FCC did not have jurisdiction to regulate wholly intrastate activity.

Iowa Utilities Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997), rev'd, AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 1999 WL 24868 (January 25, 1999). On November 6, 1998, relying on this ruling and at Bell Atlantic's request, the Virginia SCC suspended its previous order setting the February 8, 1999 deadline. On January 25, 1999, the United States Supreme Court reversed the Eight Circuit, finding that the FCC has jurisdiction to promulgate rules regarding intrastate communication pursuant to provisions of the 1996 Act. The FCC will officially regain jurisdiction to regulate intrastate intraLATA toll calls once the mandate is returned to the Eighth Circuit on February 19, 1999 and the court vacates its order vacating the FCC regulations. In the interim, there are no valid federal or state regulations requiring intrastate intraLATA dialing parity.

Bell Atlantic asserts that it will not implement intrastate intraLATA toll dialing parity until it receives authority to offer interLATA services or it is ordered to do so by the FCC or the Virginia SCC. AT&T brings this action for declaratory relief, arguing that Bell Atlantic is required by the 1996 Act to provide dialing parity for intrastate intraLATA toll calls by February 8, 1999; for an injunction requiring Bell Atlantic to take the necessary steps to provide dialing parity by that date; and for an

award of damages for any delay that might result from Bell Atlantic's failure to implement dialing parity on time.

ANALYSIS

I. Effect of a Previous Settlement Agreement

Before reaching the merits of AT&T's claim, Bell Atlantic contends that AT&T is prevented from maintaining this action by a 1996 settlement agreement releasing Bell Atlantic from any and all claims relating to intraLATA dialing parity. On April 4, 1995, AT&T filed a counterclaim in a suit brought against it by Bell Atlantic Corporation, Bell Atlantic's parent, alleging, in part, that the parent has violated state and federal antitrust laws by refusing to implement intraLATA toll dialing parity. See Def. Ex. B, Bell Atlantic Corp. v. AT&T Corp., Answer, Counterclaims and Jury Demand, Docket No. 95-610 (D.N.J. Apr. 4, 1995). As part of the settlement of that action, entered on January 23, 1996, AT&T released Bell Atlantic Corporation and all of its subsidiaries, including Bell Atlantic,

> from (i) the Counterclaim and (ii) any and all manner of claims, . . . liabilities, damages, potential actions, causes of action, suits, . . . and controversies of any kind and nature whatsoever, at law, in equity, or otherwise, whether known or unknown, which have arisen or might subsequently arise directly or indirectly from the allegations set forth in the Counterclaim.

See Def. Ex. A, Settlement Agreement at ¶ 3(a). The agreement

provided an exception to the general release for

> any pending proceeding before any regulatory body or . . . AT&T's ability to bring or participate in future regulatory proceedings provided that, in such pending or future proceedings, AT&T does not (a) claim that the AT&T Released Claims violate federal antitrust laws or state antitrust, fair competition or other trade regulations laws or (b) seek damages, refund or reimbursement for the AT&T Released Claims.

Id. The agreement is governed by Delaware law. See id. at ¶ 3.

Bell Atlantic asserts that under this settlement agreement, AT&T gave up its right to pursue any claims related to intraLATA dialing parity, regardless of when the conduct occurred, when the cause of action arose, or when the cause of action was created. Because this action relates to intraLATA dialing parity and because this is not a regulatory proceeding, Bell Atlantic contends that AT&T has no right to bring it. Although it maintains that notice of future causes of action is irrelevant given the breadth of this release, Bell Atlantic also argues that the agreement was signed less than three weeks before the 1996 Act was passed, demonstrating that AT&T had knowledge of the 1996 Act's intraLATA dialing parity provisions and did not reserve the right to sue under those provisions.

AT&T responds that the settlement agreement did not release claims arising from post-release conduct or as a result of

subsequently-enacted statutes. Furthermore, if Bell Atlantic's construction of the agreement is accurate, it is void as against public policy. AT&T first asserts that even extremely broad general releases cannot cover post-release conduct. There is no controlling Delaware authority on that point,[3] although Delaware law recognizes the validity of broad general releases. In Rob Tan Room, Inc. v. Miller, 89 A.2d 851, 855 (Del. 1952), for example, the Delaware Supreme Court discussed the

> the concept of a general release, one which is intended to cover everything--what the parties presently have in mind, as well as what they do not have in mind, but what may, nevertheless, arise. Such general releases are in common use, and their potency, if it renders them too dangerous for careless handling, is at the same time a constant boon to business and courts. Their validity is unchallenged.

More importantly, AT&T's argument would lead to the illogical conclusion that parties could not agree to release claims based on future conduct even when the releases were designed to settle lawsuits requesting injunctions. In such cases, the former plaintiff could turn around the day after the settlement and bring a new action based on the same conduct. No action requesting

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[3] AT&T cites several cases on point, none of which address Delaware law. See, e.g., Schenk v. Burger King Corp., 756 F. Supp. 543 (S.D. Fla. 1991) (applying Florida law); Massey v. Exxon Corp., 942 F.2d 340 (6th Cir. 1991) (applying Kentucky law).

injunctive relief could ever be resolved in a way that allowed the conduct at issue to continue, short of a full trial. See Main Line Theatres, Inc. v. Paramount Film Distrib. Corp., 298 F.2d 801, 803 (3d Cir.), cert. denied, 370 U.S. 939 (1962) ("Certainly, a defendant offering a sum in settlement of a suit asking, among other things, for an injunction against certain conduct, would not understand that a similar demand could be asserted the day after settlement."). We find that general releases arising out of actions seeking injunctive relief can cover prospective conduct of the same character as that complained of in the underlying action. In the instant action, the language of the 1996 settlement agreement is clearly broad enough to address future conduct.

AT&T next argues that even if the release does cover post-release conduct, it cannot operate to prohibit actions based on subsequently-enacted statutory rights. AT&T contends that to be an effective waiver of present statutory rights, a contract must include express and unmistakable language referring to those rights. See Communication Workers of America, 644 F.2d 923, 928 (1st Cir. 1981). Therefore, it must also be the case that waivers of statutory rights that have not yet been created must be stated with particularity as well. Furthermore, by reserving the right to bring future regulatory actions regarding this same issue, AT&T

demonstrated that it did not intend to forego all possible means of obtaining intraLATA toll dialing parity. Rather, it only intended to give up its causes of action under federal and state antitrust laws.

Bell Atlantic counters that the language of the agreement and relevant case law suggest a different conclusion. First, under the agreement, AT&T released "any and all manner of claims . . . whether known or unknown, which have arisen or might subsequently arise." Def. Ex. 1, Settlement Agreement at ¶ 2.a. This language is addressed to any claims, even those that do not exist at the time of the agreement, that are based on "the allegations set forth in the Counterclaim," including the failure to implement intraLATA toll dialing parity. Id. Furthermore, it would be absurd to require a general release to specifically identify all future statutory rights that might be covered. Finally, Bell Atlantic contends that general releases, by their nature, should be construed broadly to cover all claims not specifically excepted. See Coakley & Williams Constr., Inc. v. Structural Concrete Equip., Inc., 973 F.2d 349, 353 (4th Cir. 1992) ("[B]ecause the release was very broadly phrased, it seems that if the parties intended to allow any future claims against each other, they would have done so specifically."); Virginia Impression Prods. Co. v. SCM Corp., 668

F.2d 262, 265 (4th Cir. 1972), cert. denied, 405 U.S. 936 (1972) ("[T]he very nature of a general release is that the parties desire to settle all matters forever."). Therefore, the release's specific exception for regulatory proceedings actually demonstrates that no other means of addressing this issue are permissible.

We do not need to address the issue of whether general releases can ever preclude claims based on subsequently-enacted statutes because we find that this particular release could not preclude the particular claims AT&T asserts here. As the parties acknowledge, courts have frequently refused to accept waivers of rights under certain federal statutes designed to further the public interest. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."); Riley v. American Family Mut. Ins. Co., 881 F.2d 368, 371-72 n.6 (7th Cir. 1989) ("Prospective waivers [of causes of action under Title VII] would be unenforceable."); Valenti v. International Mill Servs., Inc., 610 F. Supp. 36, 38 (E.D. Pa. 1985) (regarding Age Discrimination in Employment Act); Babbitt v. Norfolk & Western Ry.

Co., 104 F.3d 89, 91-92 (6th Cir. 1997) (regarding Federal Employers' Liability Act based on specific statutory provision); Goodman v. Epstein, 582 F.2d 388, 402 n.42 (7th Cir. 1978) (Securities Exchange Act of 1934). But see Virginia Impression, 448 F.2d at 265 ("Although private enforcement is a hallmark of the antitrust laws, it is not mandatory and federal policy does not prohibit agreements among private individuals releasing such claims.") (citations omitted). Where statutes rely on the ability of private parties to assert their statutory rights in order to vindicate the public interest, those parties cannot waive these rights by contract. This seems especially true where the waiver occurred before these rights even existed. Therefore, we find that the settlement agreement does not preclude AT&T from bringing this action, because the purpose behind the 1996 Act was ultimately to benefit the general public by fostering competition among carriers.

II. Whether this Action Should Be Dismissed Without Prejudice

Bell Atlantic also contends that because the Supreme Court's decision in the Iowa Utils. Bd. case will eventually revest the FCC with the authority to order intrastate intraLATA toll dialing parity, this Court should defer to the FCC's jurisdiction and dismiss this action without prejudice. Under the doctrine of primary jurisdiction, Bell Atlantic asserts that claims "properly

cognisable in court that contain some issue within the special competence of an administrative agency" should be dismissed pending the outcome of the agency's adjudication, Reiter v. Cooper, 507 U.S. 258, 268 (1993), out of "a concern for uniform outcomes" and to allow the "agency to apply its expert judgment." Allnet Communication Serv., Inc. v. National Exchange Carrier Ass'n, Inc., 965 F.2d 1118, 1120 (D.C. Cir. 1992). Because Congress clearly gave the FCC "rulemaking authority to carry out" the provisions of §251, Iowa Utils. Bd., ___ U.S. at ___, 1999 WL 24568 at *5-6, and because there is a substantial risk of inconsistent decisions if we do reach the merits of this action, we should defer to that body regarding its implementation.

AT&T responds that the doctrine of "[p]rimary jurisdiction does not extend to a legal question that is within the conventional competence of the courts" when the Court will not need "the FCC's technical or policy expertise." National Communications Ass'n v. American Telephone and Telegraph Co., 46 F.3d 220, 223 (2d Cir. 1995). In that case, the Court identified four factors to consider in determination whether to apply the doctrine:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
> (2) whether the question at issue is particularly within the agency's discretion;
> (3) whether there exists a substantial danger of inconsistent rulings; and
> (4) whether a prior application to the agency has been made.

Id. at 222. Because this action only raises a straightforward question of statutory construction, something that is "manifestly 'within the conventional competence of the courts,'" Trans-Allied Audit Co. v. Rem Trans. Inc., 763 F. Supp. 848, 851 (D. Colo. 1989), quoting Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 305 (1976), AT&T asserts that the doctrine of primary jurisdiction does not apply to the instant action.

"No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956). This action presents a rather unique situation relative to the cases cited by the parties. Here, we are not asking whether a court should step in and decide an issue before an agency has the opportunity to do so. Rather, the FCC has

already ruled on the issue before us and promulgated regulations designed to accomplish exactly what AT&T requests in this action. Before those regulations were vacated, Bell Atlantic proposed and the Virginia SCC ordered an implementation schedule to meet the February 8, 1999 deadline. In other words, the agency had issued rules but was, and is, prevented from implementing them because of court rulings. In a sense, this action comes to us in exactly the opposite posture as most cases in which the doctrine of primary jurisdiction is raised.

Because the four-prong test identified in National Communications provides a good framework for analyzing whether the doctrine of primary jurisdiction should be applied, we now will apply that test in evaluating this issue.

a. Is the Question Within the Conventional Experience of Judges?

Under the first prong, we find that the question before us is essentially a question of statutory interpretation that is within the conventional experience of judges. AT&T asks us to determine whether the simple language of the 1996 Act requires the implementation of intrastate intraLATA toll dialing parity by February 8, 1999.

B. Is the Question Particularly Within the Agency's Discretion?

The second prong of the test asks whether the question at issue is placed particularly within the agency's discretion. This question goes to the heart of the dispute between these parties and cannot be answered without reaching the merits of the claim before us. The issue before the Court is whether the 1996 Act creates a statutory requirement that BOCs implement intrastate intraLATA toll dialing parity by February 8, 1999 in the absence of regulations or orders from the FCC or states requiring them to do so.

AT&T contends that the 1996 Act unambiguously requires Bell Atlantic to offer dialing parity for all intraLATA toll calls, including intrastate intraLATA toll calls, by February 8, 1999. Indeed, the 1996 Act creates a duty on behalf of all LECs, including Bell Atlantic, "to provide dialing parity to competing providers of telephone exchange service and telephone toll service." 47 U.S.C.A. § 251(b)(3) (Supp. 1998). Section 271(e)(2)(B) includes the following limitation:

> . . . A State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier.

AT&T argues that § 251(b)(3) creates an absolute duty to implement

dialing parity and that § 271(e)(2)(B) only postpones enforcement of this requirement until February 8, 1999 at the latest. It asserts that any other interpretation of these two provisions would nullify the express duty Congress placed on LECs to implement dialing parity.[3]

By contrast, Bell Atlantic contends that § 251(b)(3) does not create any affirmative duty in the absence of FCC or state regulations. It asserts that Congress specifically gave the authority to implement the 1996 Act's requirements to the FCC and, with limitations, to the States. Bell Atlantic further argues that the plain language of § 271(e)(2) contradicts AT&T's interpretation of the statute. Section 271(e)(2)(B) prohibits states from

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[3] AT&T also notes that Bell Atlantic's parent has previously acknowledged its obligation to initiate toll dialing parity by February 8, 1999. In a November 12, 1996 press release, Bell Atlantic Corporation stated that the 1996 Act requires its BOCs to provide dialing parity "for regional toll calls . . . when [they] can provide long distance service or by February, 1999, whichever comes first." Pl. Ex. C. Furthermore, in its 1997 annual report, Bell Atlantic Corporation stated that it expected "to offer intraLATA presubscription in Maryland, Massachusetts and Virginia coincident with our offering of long distance services in those states, or by February 8, 1999, as required by the 1996 Act." Pl. Ex. F at 21. Although it recognizes that these statements are not valid legal stipulations, see United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, 508 U.S. 439, 448 (1993), AT&T asserts that they demonstrate that Bell Atlantic really understands the 1996 Act itself, and not just the FCC's regulations, to require dialing parity by February 8, 1999.

requiring BOCs to implement intraLATA toll dialing parity before the earlier of the date the BOC receives authorization to provide interLATA services or February 8, 1999. This provision also specifically allows states to issue orders requiring intraLATA toll dialing parity before February 8, 1999 or before interLATA services are authorized, "so long as such order does not take effect until after" those dates. Bell Atlantic argues that this provision clearly contemplates that states will have discretion as to whether to require intraLATA toll dialing parity after February 8, 1999. This could not be the case if § 251(b)(3) created a self-executing duty that would bind BOCs in the absence of implementing regulations.

We find that the 1996 Act establishes in clear, unmistakable language a duty on behalf of all LECs, including Bell Atlantic, to implement intrastate intraLATA toll dialing parity.* Equally clear, however, is that Congress left implementation of this duty to the FCC, see § 251(d)(1), and, with limitations, to the states. See § 271(e)(2)(B). The statute does not include sufficient

* Black's Law Dictionary defines duty as "[a] human action which is exactly conformable to the laws which require us to obey them. Legal or moral obligation. Obligatory conduct or service. Mandatory obligation to perform." Black's Law Dictionary 453 (5th ed. 1979).

instructions as to the manner or timing for carrying out this duty by which any court could enforce it directly. We find that § 271(e)(2)(B) is, by its unambiguous terms, a restriction solely on the authority of states as to the earliest possible time at which they can order certain BOCs to implement intraLATA dialing parity. There is simply no way to read this provision either as imposing a deadline by which intraLATA toll dialing parity is required or as a limitation on the FCC's ability to implement intraLATA toll dialing parity.

AT&T insists that our interpretation of the 1996 Act essentially nullifies the duties imposed in § 251(b). We disagree. The duty to provide intrastate intraLATA toll dialing parity is clear and the FCC's obligation to implement that duty is equally clear. If the FCC fails to respond as the statute requires when it again has jurisdiction to address these issues,[1] AT&T can pursue an action against it. Because this analysis resolves the merits of

[1] Our decision relies, in part, on the reality that the FCC will again have jurisdiction to address these issues in two weeks. Were the FCC to be prevented from exercising its jurisdiction in some way, it might be appropriate for this or another court to re-examine this issue. While we find that the 1996 Act does not require implementation of intrastate intraLATA toll dialing parity by any particular date, we find that it does require such implementation. If Congress' chosen means of enforcing this duty, newly FCC regulations, were unavailable for some reason, it might be appropriate for a court to step in.

this action in a way that makes the remainder of the primary jurisdiction analysis moot, it is unnecessary to address the third and fourth prongs of that analysis.

CONCLUSION

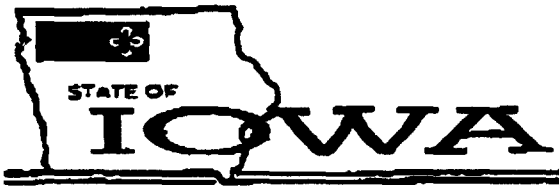
For the reasons stated above, we will grant summary judgment in favor of defendant.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

Entered this 5th day of February, 1999.

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia



THOMAS J. VILSACK
GOVERNOR
SALLY J. PEDERSON
LT. GOVERNOR

IOWA UTILITIES BOARD
IOWA DEPARTMENT OF COMMERCE

UTILITIES BOARD DELIBERATIONS

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10
February 5, 1999

The attached issue sheets are designed to provide the audience with a summary of the issues before the Board for Decision in Docket No. SPU-98-10. The issue sheets are not part of the record in this contested case. Each Board member will base their findings on the entire record developed in this proceeding.

The Final "Decision and Order" will be in writing and served on the parties when the decision is issued. The Order will be made available through the Board's Record Center and the electronic bulletin board.

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 1

Should existing customers who do not pick an IntraLATA carrier continue to receive 1+ IntraLATA services from USWC?

YES, IF REASONABLE OPPORTUNITY TO CHOOSE

ISSUE 1A

If the answer on Issue 1 is, "NO,"
What time should be allowed before customers are required to dial access codes or are defaulted to another InterLATA carrier?

TOO DISRUPTIVE

N/A

IUB "SLAMMING"

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 2

Should the USWC plan be implemented on 4/10/99?

YES

4/10/99

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 3

Should the USWC customer notice include a list of IntraLATA carriers and the carrier's telephone numbers?

YES

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 4

Should directory assistance calls dialed as 1+NPA-555-1212 subject to IntraLATA presubscription?

YES - PUBLIC PERCEPTION IS THAT THIS IS A LONG-DISTANCE CALL

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 5

Should USWC be permitted to market its IntraLATA services to <u>new customers</u> on the same call as the customer is given a list of carriers to choose from?

No

ISSUE 5A

Should the Board, to ensure neutrality for new customers calling for initial service, approve all service representative scripts?

N/A

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 6

Should new customers who do not pick an IntraLATA carrier receive 1+ IntraLATA service from the customer's InterLATA carrier or be required to dial an access code?

OPTION CHOSEN

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 7

What time should be allowed for carrier notification to USWC for inclusion in the selection listing?

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2 WEEKS

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 8

The USWC implementation plan states in part, "US West will begin accepting carrier-initiated changes for an IntraLATA selection on the date of implementation." Should this restriction be removed?

NO, LEAVE PLAN UNCHANGED

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 9

Should USWC be permitted to set 30 days prior to the implementation date as the earliest authorization date that end users may sign orders for change of service to an another carrier?

NO— SHOULD REMOVE THIS RESTRICTION
BUT IXCS NEED TO TELL
CUSTOMERS.

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 10

Should the IntraLATA Preferred Interexchange Carrier (PIC) change charge be the same as the InterLATA PIC charge, $5.00? PIC charges are accessed to end user customers.

YES

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 11

For how long a time should the one-time waiver of the PIC change charge be available for customers, 60, 90 or 120 days? This period starts with the implementation date.

EG = 120
PD = 120
AT = 90 THEN CHANGED TO 120

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 12

Should USWC be allowed to recover its conversion costs in an Equal Access Network Recovery Charge (EANRC)? EANRC charges are assessed to all carriers, including U S West.

YES

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 13

If the answer is YES to issue #12:

A. Over what time period, 3 years? OPTION CHOSEN

B. What costs are recoverable?

COST OF CAPITAL = RPU-96-9

C. Assessed on what basis? REVIEW OTHER COSTS AT TIME OF TARIFF FILING USWC FILE COST STUDY THEN

1. **Total Intrastate access minutes? (IntraLATA and InterLATA)**

2. **Total originating intrastate access minutes?** BASED ON GTE PRECEDENT

3. **Total IntraLATA originating minutes?**

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 14

Should the waived PIC charges be recovered through the EARNC or bulk billed to the carrier?

EG = EARNC

PD = EARNC

AT = BULK BILLING (FELT STRONGLY ABOUT IT & ARGUED VIGOROUSLY, BUT WON'T DISSENT)

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 15

For either new customers or old customers, choosing an InterLATA and an IntraLATA carrier, should there be just one PIC charge?

[This is not a disputed issue, but the Board will consider the need to modify the plan during its deliberations]

YES

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 16

Should customers' existing InterLATA PIC freezes be extended to IntraLATA PICs?

YES, BUT NOT FOR INITIAL 120-DAY PERIOD, (BUT CUSTOMER RESTORE ANY TIME)

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 17

Should USWC be prohibited from implementing IntraLATA PIC freezes for one year?

NO, NOT PROHIBITED

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 18

Approval of Customer Notice Form

USWC proposed customer notice is Attachment A
BOARD STAFF proposed customer notice modeled after the notice in Colorado is Attachment B

OPTION C HOSEN

US WEST COMMUNICATIONS, INC.
Docket No. SPU-98-10

ISSUE 20

Should USWC be required to provide their end users a fresh look at IntraLATA toll services covered by existing contract provisions? A fresh look would prevent the imposition of termination penalties or liabilities on customers.

No

Attachment B

NOW YOU HAVE AN ADDITIONAL CHOICE!!

You may now select a company to handle the long-distance calls you make within your LATA.* Your choice will become effective beginning April 10, 1999.

Iowa has five LATAs. One LATA includes the entire 515 area code. Two other LATAs make up the 712 area code and two LATAs make up the 319 area code (see map below). Currently, U S WEST provides all 1+ long-distance calling within a LATA. Now your may choose the company you want to carry these calls.

Your decision will not change your local telephone service provider, nor the company that handles the long-distance calls you make between the LATAs and outside of the state. Your decision also will not change your existing local calling area.

In the coming months, companies that plan to offer long-distance service within your LATA may contact you through telemarketing, advertising, or direct mail. The information provided may help you make your choice since each company's rates, plans and policies differ.

To change the company you want to use, call the business office of your chosen company. A list of companies you can choose from, with their toll free business office telephone numbers, is included with this notice. If you do not elect to make a change, U S WEST will continue to be your provider for all 1+ long-distance calls within your LATA.

You may change your long distance provider for calls made within your LATA one time at no charge through August 8, 1999. After that date, if you make a change, a $5.00 service order charge will apply.

This notice has been approved by the Iowa Utilities Board.

* A LATA is a Local Access Transport Area. Your LATA is indicated by the section of this map that includes the area code where you live.